MOTION FILED
JUN 29 1979

No. 78-1323

In the
# Supreme Court of the United States
OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
*Petitioner,*

*v.*

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
*Respondent.*

**On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE of NATIONAL ASSOCIATION OF RAILROAD TRIAL COUNSEL

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The Scheffer Press, Inc.—(312) 263-6850

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Railroad Trial Counsel hereby respectfully moves this Court for leave to file its brief as *amicus curiae* in the instant case. The consent of the attorney for the respondent and petitioner was requested. Both the respondent and the petitioner refused consent.

The questions presented herein regarding uniform application of the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* concerning the evidentiary impact of income taxes and their effect on damage awards are of vital concern to the National Association of Railroad Trial Counsel and to all of the nation's railroads. The railroads represented by the National Association of Railroad Trial Counsel are continuously confronted with death claims and lawsuits. The inability of uninformed juries to take into account the non-taxability of damage awards will result in punitive awards and excessive compensatory awards to plaintiffs, as demonstrated in the instant case, and will continue to have a disastrous effect on the already threatened public railway system. Some railroads have been subsidized by the public, the most notable subsidy being Conrail. Moreover, the increasing curtailment of railway service indicates that the socio-economic effect of this Court's decision will impact on the national railway system. Preservation of the public railway transportation system is critical to this nation's attempt to conserve energy.

Ultimately, the public bears the effect of the additional costs created by the excessive verdict of juries uninformed of the non-taxability of damage awards. In particular herein, the public is threatened with harm to the national railway system.



In the instant case, petitioner Norfolk and Western Railway Company received an excessive adverse verdict, resulting from the trial court's failure to admit evidence and to instruct the jury on the Internal Revenue Service rules on taxation of damage awards. In addition, in the lower courts, the respondent contended that the questions presented should be determined on a state-by-state basis. The National Association of Railroad Trial Counsel respectfully submits that its brief as *amicus curiae* fully emphasizes the national importance of the issues presented and the necessity of applying federal law to the issues herein. The National Association of Railroad Trial Counsel further submits that this Court's adoption of its position as set forth in its brief as *amicus curiae* will benefit the public nationwide by disposing of the issues herein as to every state in the union.

Wherefore, the National Association of Railroad Trial Counsel prays that this Court grant this motion to file its brief *amicus curiae*.

Respectfully submitted,

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## BRIEF OF AMICUS CURIAE

## ARGUMENT

### FEDERAL LAW REQUIRES THAT THE EFFECT OF INCOME TAX BE CONSIDERED IN AWARDING FELA DAMAGES.

#### A. Interest of the Amicus Curiae.

The questions presented herein regarding uniform application of the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* concerning the evidentiary impact of income taxes and their effect on damage awards are of vital concern to the National Association of Railroad Trial Counsel and to all of the nation's railroads. The railroads represented by the National Association of Railroad Trial Counsel are continuously confronted with death claims and lawsuits. The inability of uninformed juries to take into account the non-taxability of damage awards will result in punitive awards and excessive compensatory awards to plaintiffs, as demonstrated in the instant case, and will continue to have a disastrous effect on the already threatened public railway system. Some railroads have been subsidized by the public, the most notable subsidy being Conrail. Moreover, the increasing curtailment of railway service indicates that the socio-economic effect of this Court's decision will impact on the national railway system. Preservation of the public railway transportation system is critical to this nation's attempt to conserve energy.

Ultimately, the public bears the effect of the additional costs created by the excessive verdicts of juries uninformed of the non-taxability of damage awards. In particular herein, the public is threatened with harm to the national railway system.



In light of the importance of these issues to the nation's railroads, it is therefore appropriate that this Court consider the views of the National Association of Railroad Trial Counsel as set forth in this brief *amicus curiae.*

#### B. This Matter Is Governed By Federal Rather Than State Law Because The Impairment Of A Substantive Federal Right Is At Issue.

A properly measured damage award is among the substantive rights created by the Federal Employers Liability Act. (FELA), 45 U.S.C. §51 *et seq.* As this Court held in *Chesapeake & O. R. Co.* v. *Kelly,* 241 U.S. 485 (1916):

> "[T]he proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal employers liability act it must be settled according to general principles of law as administered in the Federal courts." 241 U.S. 485, 491.

*Chesapeake & O.R. Co.* v. *Kelly,* 241 U.S. 485, followed earlier cases in defining FELA damages for wrongful death as the amount surviving beneficiaries would have received had decedent lived. It further held that such damages were to be strictly measured, requiring the reduction of damage awards to present value.

The assertion of substantive federal rights cannot be defeated by mere rules of local practice and procedure. Whether a particular state procedure improperly impairs the assertion of a federal right is a federal question, requiring the application of federal law for its resolution. Amicus curiae National Association of Railroad Trial

Counsel respectfully submits that petitioner's substantive federal right to a properly measured FELA damage award was improperly defeated by the refusal of the Circuit Court of Cook County, Illinois (1) to admit evidence and to instruct the jury on the effect of income taxation on decedent's probable future income, and (2) to instruct the jury that its award of damages was not taxable.

In the lower courts respondent has contested the applicability of federal law to these questions. Although conceding petitioner's position that the measure of FELA damages is governed by federal law, respondent Liepelt has attempted to distinguish the admission of evidence and the issuance of jury instructions as strictly procedural matters, governed entirely by state law.

Respondent's argument overlooks an important principle of federalism. State procedure cannot be permitted to disregard federal rights. The general operation of state procedure is qualified by the principle that the assertion of federal rights cannot be defeated by local procedure.

Both legislative history and considerations of public policy require uniform enforcement of rights under the FELA. The central purpose of a federal statute governing the railroads' responsibilities to employees was to "create uniformity throughout the Union." H.R. Rep. No. 1386, 80th Cong., 1st Sess. 3 (1908). Uniformity is especially critical today because of the precarious financial condition of the public railway system and its increasing importance to an energy-conscious nation. Local departures from the federal rule limiting FELA compensatory damage awards, result in inflated jury verdicts, punitive in nature, which burden the public railway transportation system.



This Court has repeatedly intervened to prevent the operation of state procedural rules that impaired substantive rights under the FELA. In *Brown* v. *Western Railway of Alabama,* 338 U.S. 294 (1949), this Court reversed the dismissal of an FELA complaint by the Appellate Court of Georgia. Georgia practice required pleadings to be construed most strongly against the pleader, and the Appellate Court of Georgia found the complaint insufficient to state a cause of action. This Court reversed, holding that a federal right cannot be defeated by the forms of local practice and finding the complaint to state a cause of action under the FELA. The opinion stated, "Should this court fail to protect federally created rights from . . . over-exacting local requirements . . . desirable uniformity in adjudication of federally created rights could not be achieved." 338 U.S. 294, 299.

Local procedure was superseded by the requirements of the FELA in *Dice* v. *Akron, C. & Y. R. Co.,* 342 U.S. 359 (1952). An FELA plaintiff in Ohio had alleged that a release relied upon by defendant was obtained through misrepresentation and fraud. Ohio procedure provided for a jury trial on factual questions relating to negligence, but divided the fraud issue into parts, only one of which was tried to a jury verdict. This Court reversed and remanded the Ohio Supreme Court's judgment for defendant. This Court found that the right to a jury trial, afforded by the FELA, could not be qualified by the local procedural rules of Ohio.

In *Arnold* v. *Panhandle & S.F. R. Co.,* 353 U.S. 360 (1957), a Texas rule of practice was held inapplicable to FELA actions. The jury found that the employer had contributed to plaintiff's injury, but found for the em-

ployer on special issues regarding plaintiff's negligence. Texas practice required that a general verdict must yield to inconsistent findings on special issues, and the Appellate Court of Texas reversed a judgment for plaintiff. This Court found that the Texas Appellate Court's reversal was improper because the local procedural rule operated to defeat rights created by federal statute.

Evidentiary matters are also subject to federal scrutiny, as illustrated by *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15 (1959). A jury verdict for an Ohio FELA plaintiff was reversed on evidentiary grounds by the Ohio Supreme Court. On review, however, this Court, in finding that the proofs justified the jury's original conclusions, referred to a federal standard for sufficiency of evidence.

Thus, the substantive federal rights created by the FELA limit the operation of state procedure. Since a properly measured damage award is a substantive federal right, the evidentiary and procedural context for its assertion is not merely a matter of state law. Federal law requires that state courts permit the effective assertion of the right to a properly measured damage award. Refusal of state courts to recognize that federal substantive rights control is reversible error.

In the instant case, the trial court refused to admit evidence or to instruct the jury on the impact of income taxation on decedent's future earnings, or to instruct the jury that its award was non-taxable. *Amicus curiae* contends that those tax considerations must be considered in measuring FELA damages. Therefore, the question is not whether the trial court's refusals were permissible under Illinois procedure, but whether those refusals impermissibly prevented the assertion of a federal right.



The right to assert the FELA measure of damages is a federal question, requiring the application of federal law when violated. Respondent's characterization of the issue as procedural and governed by state law is manifestly incorrect.

### C. The Railroads Will Be Severely Prejudiced If Compensatory Damages Under The Federal Employers' Liability Act (FELA) Are Determined Without National Uniformity.

The United States Congress specifically recognized the national character of the railroad industry in House Report No. 91-1194, U.S. Cong. & Ad. News 4104, 4110 (1970):

> "With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulations and enforcement. It is a national system."

Adoption of the FELA by Congress is a further example of the interstate national character of the industry, which has required the application of federal law to achieve a national goal. In an FELA case, that goal is the protection of the employees of the railroad to insure that they obtain just compensation for their injuries. Congress adopted the FELA to avoid the variation in protection that employees were accorded on a state-by-state basis.

The national scope of the FELA is undermined to the extent that state courts vary the standard of just compensation established by the Act. In failing to consider the impact of taxation in setting wrongful death damages, some states bestow a windfall upon plaintiffs, in addition to compensatory damages, and add a punitive

dimension to an award. This departure from the requirements of federal law severely prejudices the railroads.

These considerations suggest the wisdom of Congress in adopting the FELA as a uniform national system of compensation. Reasons of public policy, as well as legislative intent and fairness to litigants, compel this Court to establish a national rule that taxation be considered in computing FELA damages.

### D. Federal Law Requires That The Effect Of Taxation Be Considered In Computing Wrongful Death Damages Under The FELA.

The FELA provides for compensatory damages in personal injury and wrongful death actions. It does not provide for punitive damages. Compensatory damages "place the injured person as nearly as possible in the position he would have occupied had the wrong not occurred." McCormick, Law of Damages, 560 (1935). This Court has defined the measure of damages in an FELA wrongful death action as the amount the decedent's beneficiaries could reasonably have expected to have applied to their benefit if the decedent had lived. *Norfolk & W. R. Co.* v. *Holbrook,* 235 U.S. 625, 629 (1915); *Michigan Central R.R. Co.* v. *Vreeland,* 227 U.S. 59, 72-73 (1913). In limiting damages to the amount beneficiaries would have received, this Court has required that awards for lost prospective financial benefits be reduced to present value. *Chesapeake & O. R. Co.* v. *Kelly,* 241 U.S. 485 (1916). Likewise, a reduction must be made for that part of decedent's income he would have applied to his own benefit. *Kansas City Southern R. Co.* v. *Leslie,* 238 U.S. 599 (1915). The FELA is designed to make plaintiff whole, not to bestow a windfall upon him.



Taxation inescapably reduces the percentage of gross income any wage earner can apply to the benefit of his dependents while he lives. A decedent's beneficiaries cannot reasonably expect that monies taken by taxation would have been applied to their benefit had he lived, since only a decedent's after-tax net income could have been applied to their benefit had he lived. To the extent that a damage award for wrongful death includes monies that could not have been applied to plaintiff's benefit during decedent's life, plaintiff has not been made whole but has received a windfall. To the same extent, a defendant, whose duty extends only to make a plaintiff whole, has been penalized. Such a damage award is not merely compensatory but punitive.

Recognizing the compensatory nature of damages and the impact of taxation on disposable income, the majority of federal jurisdictions favor consideration of income tax in computing FELA wrongful death damages. The majority position was first articulated in *McWeeney* v. *New York, N.H. & H. R.R. Co.,* 282 F.2d 34 (2d Cir. 1960). While finding the tax impact in the case before it to be minimal, *McWeeney* recognized "cases where failure to make some adjustment for the portion of a plaintiff's or decedent's earnings that would have been taken by income taxes would produce an improper result." 282 F.2d 34, 38.

Other Courts of Appeals have adopted and applied the flexible *McWeeney* test. The Seventh Circuit has ruled that evidence of income taxes must be introduced upon proper presentation where significant differences would exist between a decedent's gross and net income. Considering the loss of pecuniary benefit where the decedent anticipated earnings between $15,655 and $20,000 for 20 years commencing in 1979, the Seventh Circuit ruled

in *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893 (7th Cir. 1967):

> "This is a case where the impact of income tax has a significant and substantial effect in the computation of probable future contributions and may not be ignored." 379 F.2d 893, 896.

Similarly, a $335,000 FELA award was set aside in *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284 (9th Cir. 1975), for refusal to admit evidence on income taxes. The *Boxberger* court held:

> "[W]e believe it altogether right and proper that in cases wherein the annual gross income is such that future taxes would have a substantial effect, evidence of the decedent's past and future tax liability should be admitted if a reasonably fair and accurate estimate of his lost future income is to be assured." 529 F.2d 284, 291.

The *McWeeney* rule has also been recognized in *Petition of M/V Elaine Jones*, 480 F.2d 11 (5th Cir. 1973); *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970); and *Sanchez* v. *Denver & Rio Grande Western R. Co.*, 538 F.2d 304 (10th Cir. 1976).

In the instant case, income tax would have had a significant effect on decedent Delroy Liepelt's income and contributions to his dependents. *Cox* v. *Northwest Airlines Inc.*, 379 F.2d 893, concerned earnings between $15,655 and $20,000 over a 20-year working life beginning in 1979. Decedent Liepelt fell easily in that income range, earning $13,000 in 1973, and expecting to earn over $16,000 by 1977 with 5% annual increases over his projected 24-year working life. (A48, A52-A53). Plaintiff's expert witness calculated pecuniary loss to be $302,000. (A53-A54). Defendant's offer of proof indicated the figure, after subtraction of taxes, to be $115,325. (A75). The difference of $187,000 represents a significant tax impact. The failure to consider the impact of taxation resulted in substantial prejudice to the defendant.



*McWeeney* v. *New York, N.H. & H. R.R. Co.*, 282 F.2d 34, discussed the principal objections raised to the consideration of income tax in measuring damages. The principal objections are (1) that the amount of future taxation is purely speculative, (2) that the computation of future tax liability is too complex and confusing for juries, and (3) that the refusal to compute taxes and the consequent advantage to plaintiff is offset by the refusal to instruct on other matters, notably inflation and attorneys' fees, which operate against plaintiff. None of these objections can be supported in logic or fairness.

First, the amount of future taxation is not purely speculative. As the Court of Appeals found in *Southern Pac. Co.* v. *Guthrie*, 180 F.2d 295, 302 (9th Cir. 1949), "[the decedent] would have found taxes fully as certain as his prospect of continued earnings." The actual impact of future taxation is no more speculative than other variables considered in determining damages. The Ninth Circuit held as follows:

> "While not subject to precise mathematical exactitude, such a projection does not appear to be too uncertain, conjectural or speculative for the jury to consider. Certainly such considerations are no more speculative than the possibility of death from natural causes, disabling, non-compensable injuries from other causes, or the future instability of familial relationships." *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 292-93 (9th Cir. 1975).

The Seventh Circuit equated the uncertainty of taxation with that of life expectancy and future earnings, necessary elements of wrongful death damages. *Cox* v. *North-*

*west Airlines, Inc.*, 379 F.2d 893. Two distinguished commentators have written as follows:

> "As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as 'death and taxes,' the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence is brought before them." Harper & James, Law of Torts, § 25.12 (1936).

American juries routinely make judgments on matters as speculative as future tax liability. In logic and fairness, information on that issue should be available to them.

Second, the computation of future tax liability is neither too complex nor too confusing for juries to undertake. The Court of Appeals in *Boxberger* stated as follows:

> "[T]oday's sophisticated jurors surely have had some personal experience in determining their own tax liability, and in today's tax-conscious society we are confident that our juries and judges, with the aid of such competent expert testimony as may be received, are equal to the task and the responsibility." 529 F.2d 284, 293.

Subsequent to *Chesapeake & O. R. Co.* v. *Kelly*, 241 U.S. 485 (1916), this Court has required the reduction of damage awards to present value, a computation of equal complexity, which is far more alien to lay jurors. Indeed, those courts finding the difficulties of computation insuperable have been able to summarize the principal difficulties in a paragraph or two. Suitable jury instructions need not be greatly more complex.

Furthermore, in light of the current pervasive public concern over taxes, jurors are likely to assume that income taxes apply to any verdict they award. Uninstructed juries have requested guidance on the effect of taxation on their own motions. *Kennett* v. *Delta Air Lines, Inc.*, 560 F.2d 456 (1st Cir. 1977). To what extent such calculations are made informally, without an evidentiary base or instruction from the court, is unknown. Since juries in all likelihood do consider taxes, they should be instructed as to the non-taxability of damages.



Finally, it cannot be concluded that a failure to consider future taxation is offset by the failure to consider inflation and attorneys' fees for the following reasons: First, such an informal and amorphous system of balancing is inaccurate. Second, the jury herein considered inflation, since plaintiff introduced evidence projecting a 5% annual increase in decedent's earnings, partly as allowance for inflation. (A48) Third, attorneys' fees are not properly an element in computing compensatory damages and cannot properly be regarded as an offset in computing such damages. As the Court of Appeals held in *Burlington Northern, Inc.* v. *Boxberger*:

> "Attorneys' fees are related to private contracts between the litigants and the attorneys. They have no legitimate relevancy to the issue as to what amount of money is justly compensatory for the loss resulting from defendant's tortious act." 529 F.2d 284, 294.

Inflation and attorneys' fees do not and should not operate to offset the windfall conferred on plaintiff by the failure to consider income taxation. It is unrealistic to suggest redressing that imbalance through lack of instruction to the jury rather than through specific guidance for the jury.

In summary, none of the objections to considering income taxation have a basis in logic or fairness. Prospec-

tive tax liability is no more speculative or complex than other determinations that juries routinely make in assessing wrongful death damages. This Court has held the measure of damages for wrongful death under the FELA to be the amount the beneficiaries would have had applied to their benefit if the decedent had lived. Accordingly, most federal jurisdictions consider taxation in computing damages when, as here, it significantly affects what the beneficiaries would have received. Failure to consider a significant tax impact created an unexpected gain for plaintiff, contemplated by neither the statute nor this Court's decisions, and a corresponding penalty for defendant. Therefore, this Court should affirm the majority federal rule and reverse and remand the instant case.

**E. The Court Should Have Instructed The Jury That An Award Of Damages Was Not Subject To Income Taxation.**

The failure of the trial court to instruct the jurors that the damage award is not taxable created the likelihood that the jurors would assume that such an award was subject to taxation. Such an error would have led the jury to overcompensate the plaintiff by increasing the award to offset taxes. The refusal of the trial court to give defendant's Instruction 19 was therefore error.

In *Burlington Northern, Inc.* v. *Boxberger,* 529 F.2d 284 (9th Cir. 1975), the Ninth Circuit considered at length the issue of the prejudicial effect of the failure to give such an instruction. The Court of Appeals concluded that such an instruction would prevent misconceptions by the jury and would clarify the issue of the tax consequences of the award.



> "To put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable." 529 F.2d 284, 297.

No federal Court of Appeals has held that it is error to give an instruction that damage awards are non-taxable. The Third Circuit in *Domeracki* v. *Humble Oil & Refining Co.,* 443 F.2d 1245 (3d Cir. 1971), and the Ninth Circuit in *Boxberger,* 529 F.2d 284, required that such an instruction be given. At least three other circuits have held the instruction to be within the discretion of the trial court. *McWeeney* v. *New York, N.H. & H. R.R. Co.,* 282 F.2d 34 (2d Cir. 1960); *Bach* v. *Penn Central Transportation Co.,* 502 F.2d 1117 (6th Cir. 1974); *Nichols* v. *Marshall,* 486 F.2d 791 (10th Cir. 1973).

The Seventh Circuit in *Cox* v. *Northwest Airlines, Inc.,* 379 F.2d 893 (7th Cir. 1967), a non-jury case, required deduction for income taxes from damage awards in death cases where the deductions would be significant. A jury instruction on the issue of income taxation on damage awards would therefore be required in the instant case to achieve such a result. The reasoning on the jury instruction issue set forth in *Boxberger* is therefore applicable to the instant case. Since a significant impact on the damage award did result herein, an instruction that a damage award is not subject to income taxation should have been given as submitted by defendant.

## CONCLUSION

Wherefore, the *amicus curiae* respectfully submits that this Court should reverse the decision of the Illinois Appellate Court and that the case should be remanded for a new trial.

Respectfully submitted,

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